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PARTNERSHIP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LEON ALPERT, an individual, on behalf of
himself, on behalf of all those similarly
situated, and on behalf of the general public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a Delaware
corporation, and DOES 1 TO 100,

Defendants.

CV No. 08CV582 BTM

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT TIME WARNER CABLE'S
MOTION FOR SUMMARY JUDGMENT
OR, IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Date May 23, 2008
Time 11:00 a.m.
Ctrm: 15
Judge: Hon. Barry Ted Moskowitz

**[NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT]**

Complaint: March 13, 2007
FAC: May 16, 2007
Removal: March 28, 2008

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Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San Diego Division, dba Time Warner Cable (“TWC”), sued erroneously as Time Warner Cable, Inc., respectfully submits the following memorandum of points and authorities in support of its motion for summary judgment or, in the alternative, partial summary judgment.

I. INTRODUCTION.

Plaintiff Leon Alpert’s (“Plaintiff”) class action lawsuit against TWC is based on his erroneous suspicion, and nothing more, that he was overcharged for his cable and cable related services. Plaintiff stuffs multiple alleged theories of unlawful, unfair, and deceptive conduct into a single cause of action for violation of California Business & Professions Code section 17200, *et seq.* (“Unfair Competition Law” or “UCL”), yet all of Plaintiff’s claims are based on the same factual premise—his mistaken belief that TWC charged him for basic cable services.

In fact, TWC never charged or received payment from Plaintiff for basic cable (the primary grouping of cable television channels that virtually all cable customers purchase). Rather, basic cable was paid for by Plaintiff’s homeowners’ association pursuant to a separate bulk agreement providing for the provision of the basic cable channels to all the units within his complex. Pursuant to that agreement, Plaintiff was permitted to (and did) purchase additional cable services (movie channels, digital phone service and internet access) under his own account with TWC. TWC never overcharged Plaintiff by billing Plaintiff for basic cable services (or in any other manner) as Plaintiff contends.

The undisputed facts, including Plaintiff’s own deposition testimony, show that (1) TWC did not charge or collect any money from Plaintiff for the basic cable services it provided to his residence; (2) TWC charged and was paid by Plaintiff’s homeowners’ association for the basic cable services; (3) Plaintiff was aware that his homeowners’ association paid TWC for his basic cable; and (4) TWC charged Plaintiff the correct price for the additional services (that is, those services other than basic cable) he purchased—both when he initially ordered a variety of individually priced services, and when he later ordered a bundled package of services in order to obtain a discounted price. It was this price reduction that caused Plaintiff to speculate that he had

1 previously been overcharged. However, this price reduction reflects a discount that was available
2 at that time for ordering such services in a bundle and in no way supports his claim that he had
3 previously been overcharged.

4 All of Plaintiff's claims are based on the incorrect premise that he had somehow been
5 charged for basic cable services even though his homeowners' association was paying for basic
6 cable on his behalf. However, Plaintiff's itemized bills contained no charges for basic cable, and,
7 at all material times, he was aware that his homeowners' association was paying for his basic
8 cable. These theories are based on facts that simply do not exist and, accordingly, cannot be
9 proven. In the end, Plaintiff cannot escape the fact that he received exactly what he paid for from
10 TWC. TWC respectfully requests that the Court grant its motion for summary judgment on the
11 grounds that Plaintiff cannot prove his cause of action for violation of the UCL.

12 **II. BRIEF PROCEDURAL HISTORY.**

13 On or about March 13, 2007, Plaintiff commenced this action in the Superior Court of
14 California, County of San Diego, on behalf of himself and all others similarly situated. Following
15 a demurrer by TWC, Plaintiff filed a First Amended Complaint on or about May 16, 2007.
16 Plaintiff's original Complaint and First Amended Complaint allege a single unfair competition
17 claim against TWC and contain no allegations to establish an amount in controversy that would
18 exceed \$5 million.

19 On January 15, 2008, TWC filed a motion for summary judgment, which was scheduled
20 to be heard on April 4, 2008. During the seventy-five day notice period allowed for the motion,
21 Plaintiff conducted and sought to enforce discovery as he deemed necessary to oppose TWC's
22 summary judgment motion. On or about March 24, 2008, Plaintiff filed his opposition to TWC's
23 motion for summary judgment, in which he referenced a federal predatory pricing claim and
24 violation of a Federal Communications Commission ("FCC") order. Plaintiff's opposition papers
25 also alleged damages in an amount that would exceed \$5 million.

26 On March 28, 2008, TWC removed the action to this Court in response to Plaintiff's
27 opposition papers raising federal claims and setting forth an amount in controversy that satisfies
28 the Class Action Fairness Act of 2005. TWC hereby re-files its motion for summary judgment,

1 which is substantively identical to its motion filed in state court. Class certification issues have
2 been postponed pending the results of this motion.

3 **III. STATEMENT OF UNCONTROVERTED FACTS.**

4 **A. Plaintiff's Homeowners' Association's Contract with TWC.**

5 Plaintiff is a resident of Sea Point Townhomes in Del Mar, California. (Separate
6 Statement of Undisputed Facts in Support of Defendant Time Warner Cable's Motion for
7 Summary Judgment ("SS") ¶ 1.) Sea Point Townhomes is a homeowners' association that has
8 contracted with TWC for certain cable services to be provided to the residents of Sea Point
9 Townhomes (the "HOA" or "HOA"). (SS ¶ 2.) This agreement between Sea Point Townhomes
10 and TWC is referred to as a Residential Bulk Services Agreement (the "Agreement"). (SS ¶ 2.)

11 **1. The Agreement Between the HOA and TWC is Limited to Basic Cable Services.**

12
13 The Agreement provides that TWC will provide 76 cable channels, sometimes referred to
14 as "basic cable," to each home/unit of Sea Point Townhomes, and that Sea Point Townhomes will
15 pay TWC a monthly fee per home/unit for such services. (SS ¶ 3.) Specifically, Section 1 of the
16 Agreement, entitled "Operator's Service Obligations," provides that TWC "*will* offer Bulk Multi-
17 Channel Video Services to Residents." (SS ¶ 4 (emphasis added).) Bulk Multi-Channel Video
18 Services is defined as a "basic cable" package of services that includes 76 cable television
19 channels listed in Exhibit B to the Agreement. (SS ¶ 5.) Section 2 of the Agreement, entitled
20 "Rates and Services," states that the "HOA shall pay to [TWC] a monthly Bulk Multi-Channel
21 Video Services fee" which is set forth in Exhibit B to the Agreement. (SS ¶ 5.) The fee for such
22 basic cable services is to be billed for and paid by the Sea Point Community HOA. (SS ¶ 6.)

23 **2. Residents May Contract with TWC for Additional Services.**

24 Although basic cable is provided to HOA residents under the Agreement with the HOA,
25 individual residents are free to order additional services from TWC and/or otherwise do business
26 with TWC. (SS ¶ 7.) In that regard, Section 1 of the Agreement provides that TWC "*may* [but is
27 not obligated to] offer and provide Additional Service to Residents on a non-exclusive basis."
28 (SS ¶ 8, 9 (emphasis added).) Additional Services are defined as "any services *other than* the

1 Bulk Multi-Channel Video Services [basic cable], including, but not limited to, premium
 2 channels, pay-per-view, music, digital tier, video-on-demand, and other video and music services
 3 not included in the Bulk Multi-Channel Video Services package, high speed data and Internet
 4 access services, voice services, etc.” (SS ¶ 10 (emphasis added).)

5 HOA residents who chose to order Additional Services from TWC are responsible for
 6 paying TWC for such services. (SS ¶ 11.) Pursuant to Section 2 of the Agreement, “Residents
 7 will be billed directly for all service charges, taxes, franchise fees, and other fees assessed in
 8 conjunction with Additional Services.” (SS ¶ 12.) No rates or special pricing for Additional
 9 Services are provided for in the Agreement. (SS ¶ 13.)

10 **B. Plaintiff’s Relationship with TWC.**

11 Since March 2003, TWC has provided the Bulk Multi-Channel Services (“basic cable”) to
 12 Plaintiff’s residence as set forth in the Agreement between TWC and the HOA. (SS ¶ 14.) TWC
 13 has not billed or collected money from Plaintiff for these services, nor has Plaintiff paid anything
 14 to TWC for the services. (SS ¶ 15.) Per the Agreement, TWC is paid by the HOA for providing
 15 such services. (SS ¶ 16.) Plaintiff knew and understood that the HOA paid TWC for the basic
 16 cable he received from TWC. (SS ¶ 17.)

17 **1. Plaintiff Orders Several Additional Services from TWC.**

18 Since March 2003, Plaintiff has ordered certain Additional Services from TWC under a
 19 contract titled “Time Warner Cable Residential Services Subscriber Agreement” (“Consumer
 20 Agreement”). (SS ¶ 18.) TWC has billed Plaintiff for the Additional Services he ordered, and
 21 Plaintiff has paid TWC directly for such services. (SS ¶ 19.) TWC’s bills to Plaintiff for his
 22 Additional Services contain a detailed itemization of each Additional Service and associated
 23 charge for each such service. (SS ¶ 20.) It is clear from the invoices that he was charged only for
 24 the Additional Services he ordered and was not charged for basic cable services. (SS ¶ 21.) As
 25 recently as August 2006, the Additional Services ordered by Plaintiff included the following
 26 features and pricing:

27 Digital Phone Package (\$39.95); iControl Premium Service (\$6.95);
 28 HDTV Converters (\$7.00 x 2); Service Protection Plan (\$2.95);
 Premier Digital (\$11.00); Any 4 Premium Channels (\$24.95);

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Wireless Road Runner (\$54.90); special order items such as on-demand movies; as well as applicable taxes and fees.

(SS ¶ 22.)

2. Plaintiff Changes His Additional Services to a Bundle Package.

In 2005, TWC began to offer Additional Services in various bundled packages for bulk customers, such as HOA members, at a discount off the aggregate price of the individual services. (SS ¶ 23.) Plaintiff was generally familiar with TWC advertising relating to bundled packages and knew that customers ordering bundled services received a discount off the a la carte price for the same services. (SS ¶ 24.)

In or about August, 2006, Plaintiff became aware that TWC was offering a particular bundled package of Additional Services that included many of the services Plaintiff was individually purchasing. In or about September, 2006, Plaintiff changed his account with TWC to add Additional Services including this bundled package (shown below in item 3) with the following features and pricing:

(1) HDTV Converter (\$8.00); (2) Service Protection Plan (\$2.95); (3) Hoa DIGIPiC 4000 Plan (\$121.90)—which includes Wireless Roadrunner, Digital Phone Package, Free On Demand, iControl Premium Service, Digital Access, Cinemax, HBO, Navigator Screen Guide, Showtime, STARZ, Digital Movie Pack, Digital Sports Pack, Digital Variety Pack, Basic Cable Paid by Hoa, and Road Runner High Speed; special order items such as on-demand movies; as well as applicable taxes and fees.

(SS ¶¶ 25, 27.) Plaintiff changed to this bundled package in order to get a better price. (SS ¶ 26.) As a result of Plaintiff modifying his Additional Services, and ordering them in a bundled package vis-à-vis a la carte, Plaintiff's charges for Additional Services decreased. (SS ¶ 28.)

3. Plaintiff Testifies TWC's Bills for Additional Services Were Correct.

At deposition, Plaintiff testified that the bills he received for Additional Services were correct both before and after he altered his services and ordered a bundled package in September, 2006. (SS ¶ 33.). Plaintiff also testified that he knew and understood that the HOA was paying for his basic cable at or around the time he first moved into his residence:

////

1 “Q: [You] were aware . . . that your HOA was paying Time Warner
2 for basic cable service for your service. Correct?

3 A: Yes.

4 Q: When do you recall being first aware of the fact that the HOA
5 had an agreement with Time Warner, the result of which is basic
6 cable was provided by Time Warner—by the HOA?

7 A: I believe it was around the time we moved in.”

8 (SS ¶ 37.)

9 **4. Plaintiff Agrees to Notify TWC of Billing Errors.**

10 As part of the Consumer Agreement under which Additional Services were provided by
11 TWC to Plaintiff, Plaintiff agreed that it was his responsibility to report TWC billing errors
12 within thirty days from the receipt of any bill containing such errors, so that service levels and
13 payments can be verified. (SS ¶ 29.) Plaintiff further agreed to waive any errors that were not
14 reported within thirty days of receipt. (SS ¶ 30.) Additionally, Plaintiff’s monthly invoices from
15 TWC for his Additional Services included conspicuous reminders to report billing errors within
16 thirty days. (SS ¶ 31.)

17 At deposition, Plaintiff responded to questions regarding the reasonableness of asking
18 customers to identify billing errors within thirty days by stating that “I don’t think it’s
19 unreasonable to make the complaint within 30 days. . . you know – that seems reasonable.” (SS
20 ¶ 32.) Plaintiff never had occasion to report billing errors to TWC because, as Plaintiff testified
21 in his deposition, the bills he received for Additional Services were correct. (SS ¶ 33.)

22 **IV. STANDARD OF REVIEW.**

23 Summary judgment should be granted when there is no genuine issue as to any material
24 fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A
25 material fact is “genuine” only “if the evidence is such that a reasonable jury could return a
26 verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);
27 *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). “If the evidence is merely
28 colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v.*
Liberty Lobby, Inc., 477 U.S. at 249-50.

1 The moving party has the initial burden to show the absence of a material and triable issue
 2 of fact. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). The burden then
 3 moves to the opposing party, who must present significant probative evidence tending to support
 4 its claim or defense. *Id.* The opposing party must go beyond the pleadings and by his own
 5 evidence set forth specific facts showing that there is a genuine issue for trial. *Far Out*
 6 *Productions, Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001); Fed. R. Civ. P. 56(e). Summary
 7 judgment is appropriate when the opposing party “fails to make a showing sufficient to establish
 8 the existence of an element essential to that party’s case, and on which that party will bear the
 9 burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita*
 10 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

11 **V. THE COURT SHOULD GRANT SUMMARY JUDGMENT IN FAVOR OF TWC**
 12 **BECAUSE PLAINTIFF CANNOT PROVE A UCL VIOLATION.**

13 Plaintiff brings one cause of action against TWC under the UCL, alleging that TWC
 14 violated the UCL by engaging in the following conduct:

15 (1) overcharging HOA customers for cable services by not
 16 providing such customers with HOA pricing that accounts for the
 17 cable services already provided under TWC’s contract with the
 18 customers’ HOA;

19 (2) attempting to limit customers’ right to seek refunds for billing
 20 errors to thirty days while failing to disclose that HOA pricing is
 21 available to HOA subscribers;

22 (3) including an unconscionable clause in customer agreements that
 23 require customers to notify TWC of billing errors within thirty days
 24 in alleged violation of Civil Code 1770(a)(19);

25 (4) misrepresenting to customers its affiliation, connection, or
 26 association with HOAs with whom it has contracted to provide
 27 cable services in alleged violation of Civil Code 1770(a)(1);

28 (5) making false or misleading statements that the reduction in price
 for customers ordering a bundled package of services vis-à-vis a la
 carte services is due to discounts associated with the bundling of
 services, when in reality the reduction in price is due to HOA
 pricing that HOA residents are entitled to, in alleged violation of
 Civil Code 1770(a)(13); and

////

////

(6) breaching its agreements with HOAs by charging HOA customers directly for services already provided for under agreements between TWA and the HOAs and paid for by the HOAs.

(First Amended Complaint ¶¶ 38-43.) These various claims are grounded on Plaintiff's incorrect theories that TWC charged him for basic cable service already being provided by his HOA. Such theories are entirely incorrect and contradicted by the undisputed facts. Summary judgment should be granted in favor of TWC because Plaintiff cannot prove that TWC engaged in any unlawful, unfair, or misleading conduct to support his UCL claim.

A. Plaintiff Cannot Prove That TWC Engaged in Unlawful Conduct.

1. Standard for "Unlawful Conduct" Under the UCL.

A business act or practice is "unlawful" under the UCL only if it is "forbidden by law." *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1992). The California Supreme Court has explained that Section 17200 "'borrows' violations of other laws and treats them as unlawful practices independently actionable under section 17200 *et seq.*" *Id.*

There is no evidence that TWC engaged in an act or practice considered "unlawful." Plaintiff attempts to create a causes of action under the "unlawful" prong of Section 17200 by alleging violations of the Civil Legal Remedies Act ("CLRA") and a breach of contract between TWC and the HOA. In particular, Plaintiff argues that TWC violated Civil Code sections 1770(a)(3)¹, 1770(a)(13), and 1770(a)(19). However, such arguments are unsupported by the facts, lack merit, and cannot withstand summary judgment.

2. Plaintiff Cannot Prove TWC Violated of Civil Code Section 1770(a)(3).

Section 1770(a)(3) of the CLRA prohibits "[m]isrepresentating the affiliation, connection, or associate with, or certification by, another." Cal. Civ. Code § 1770(a)(3). A claim may be stated under CLRA for failure to disclose, but it has been held that "to be actionable the omission

¹ In the FAC, Plaintiff alleges that TWC misrepresented its affiliation, connection, or association with the HOA in violation of Civil Code section 1770(a)(1). However, section 1770(a)(1) proscribes "[p]assing off goods or services as those of another." It is section 1770(a)(3) that prohibits "[m]isrepresentating the affiliation, connection, or association with, or certification by, another." Cal. Civ. Code § 1770. Accordingly, Plaintiff's citation to section 1770(a)(1) is in error and should be to section 1770(a)(3).

1 must be contrary to a representation actually made by the defendant, or an omission of a fact the
 2 defendant was obliged to disclose.” *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th
 3 824, 835 (2006).

4 Plaintiff alleges that TWC violated section 1770(a)(3) of the CLRA by misrepresenting its
 5 affiliation with Plaintiff’s HOA. This purported misrepresentation is based on two grounds: (1)
 6 TWC not informing Plaintiff of the rates for Additional Services that he was allegedly entitled to
 7 as an HOA member and which would have reflected the fact that his basic cable was already
 8 being paid through the HOA, and (2) TWC not disclosing to Plaintiff that it was collecting fees
 9 for his basic cable service from the HOA. (First Amended Complaint ¶ 14.)

10 Plaintiff’s claim that TWC violated section 1770(a)(3) of the CLRA fails as a matter of
 11 law because the undisputed facts show that:

12 (1) Plaintiff was not entitled to any particular rates for Additional
 13 Services (SS ¶ 35.);

14 (2) TWC had no duty to inform Plaintiff of all its rates, packages,
 15 and promotions for Additional Services, which were not even in
 16 existence at the time Plaintiff originally ordered Additional
 17 Services (SS ¶¶ 18, 23, 36.);

18 (3) Plaintiff knew and understood that the HOA paid TWC for his
 19 basic cable (SS ¶ 37.);

20 (4) TWC had no duty to inform Plaintiff that the HOA was paying
 21 TWC for his basic cable (SS ¶ 38.);

22 (5) TWC did not charge or collect money from Plaintiff for basic
 23 cable (SS ¶ 39.);

24 (6) TWC correctly charged Plaintiff for the Additional Services he
 25 ordered (SS ¶ 40.).

26 Each one of these undisputed facts alone negates Plaintiff’s UCL claim based on purported
 27 unlawful conduct by TWC in violation of Civil Code section 1770(a)(3).

28 **3. Plaintiff Cannot Prove TWC Violated Civil Code Section 1770(a)(13).**

Section 1770(a)(13) of the CLRA prohibits “[m]aking false or misleading statements of
 fact concerning reasons for, existence of, or amounts of price reductions.” Cal. Civ. Code §
 1770(a)(13). Plaintiff alleges that TWC violated this statute by misinforming him that his cable
 bill was reduced because he ordered a bundle of services rather than individual services, when the

1 real reason for the price reduction was due to TWC already collecting basic cable fees on behalf
2 of Plaintiff. (First Amended Complaint ¶¶ 15, 42.)

3 Similar to Plaintiff's claims for violation of section 1770(a)(3), Plaintiff's attempt to
4 establish a violation of section 1770(a)(13) by TWC fails as a matter of law because it is factually
5 incorrect. Plaintiff has admitted that he was charged the correct price by TWC both when he
6 ordered Additional Services a la carte, and when he later ordered a bundled package for a lower
7 price. (SS ¶ 42.)

8 The real reason that Plaintiff's bill for Additional Services was reduced was because he
9 changed his services and ordered a bundled package rather than a host of individual services. (SS
10 ¶ 43.) Plaintiff's own deposition testimony confirms that the price reduction was due to his
11 switch to a bundled package. Plaintiff testified at deposition that he was familiar with TWC
12 advertising relating to bundled packages and knew that customers ordering bundled services
13 received a discount off the price for the same services ordered a la carte. (SS ¶ 44.) Plaintiff
14 even admitted that he changed his Additional Services to a bundled package in order to get a
15 better price. (SS ¶ 45.) The undisputed evidence shows that Plaintiff's reduction in price was
16 due to the bundled discount, something that he was well aware of, and something that he
17 specifically sought. Accordingly, there is no violation of Civil Code section 1770(a)(13) to
18 support Plaintiff's UCL claim.

19 **4. Plaintiff Cannot Prove TWC Violated Civil Code Section 1770(a)(19).**

20 Civil Code section 1770(a)(19) proscribes "[i]nserting an unconscionable provision in the
21 contract." Cal. Civ. Code § 1770(a)(19). Plaintiff claims that TWC violated section 1770(a)(19)
22 by requiring customers to report billing errors within thirty days. (First Amended Complaint
23 ¶¶ 21-23, 40.) That provision of the Consumer Agreement provides: "I agree that it is my
24 responsibility to report TWC billing errors within 30 days from receipt of the bill so that service
25 levels and all payments can be verified. If not reported within 30 days, the errors are waived."
26 (SS ¶ 47.) A reminder is also included in each TWC invoice, conspicuously stating:

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“Note: If you believe this statement contains a billing error, we must hear from you within 30 days of receipt of the statement in question. If we are not notified of the discrepancy the statement will be considered correct.”

(SS ¶ 48.)

A court may deem a contract provision unconscionable only if it is both procedurally and substantively unconscionable. *See Armendariz v. Foundation Health Pyschcare Services, Inc.*, 24 Cal. 4th 83, 114 (2000). The procedural element of unconscionability focuses on two factors: oppression and surprise. *Id.* Oppression arises where there is an inequality of bargaining power resulting in no real negotiation and an absence of meaningful choice. *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 808 (2006). Surprise “involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.” *Id.* The substantive element of unconscionability deals with the “actual terms of the agreement and evaluates whether they create ‘overly harsh’ or ‘one-sided’ results as to ‘shock the conscience.’” *Id.*

Any claim of oppression is defeated if there an availability of alternative sources from which to obtain the desired service. *See, e.g., Freeman v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th 660, 670 (2003). Moreover, when the challenged term is in a contract concerning a nonessential recreational activity, the consumer always has the option of simply foregoing the activity. *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224 (2007) (requirement that plaintiff purchase basic cable tier to listen to music or FM radio is not unconscionable because listening to music or FM radio is a nonessential recreational activity that Plaintiff could simply have forgone); *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621-22 (1996) (ski repair company’s contract provision releasing company from liability for injury resulting from its work is not unconscionable because skiing is a nonessential recreational activity).

a. Plaintiff Lacks Standing to Challenge the Contract Provision.

Plaintiff’s assertion that this provision is unconscionable is nothing more than a red herring argument which, in any event, he lacks standing to raise. TWC’s requirement of thirty-day notification of billing errors is entirely inapplicable to Plaintiff’s allegations—which do not

1 involve a billing error. Plaintiff admits that he was correctly charged for the Additional Services
 2 he ordered both before and after he switched to a bundled package. (SS ¶ 50.) Accordingly,
 3 there were no billing errors for Plaintiff to report and the provision does not come into play. The
 4 fact that Plaintiff received a better price after changing to a package of bundled services does not
 5 render TWC's earlier a la carte pricing "erroneous." In any event, Plaintiff was not denied a
 6 retroactive credit because he failed to report an "error" within 30 days. Rather, it was denied
 7 because he was not entitled to it.

8 **b. The Contract Provision is Not Unconscionable.**

9 Furthermore, Plaintiff cannot prove that this common billing provision is unconscionable
 10 for several reasons. First, Plaintiff did not lack a meaningful choice in bargaining for TWC to
 11 provide him with Additional Services. Plaintiff had other means of obtaining the entertainment
 12 provided by his ordering Additional Services from TWC, such as renting movies, reading books,
 13 using a satellite service, using another telephone provider, and using another internet provider.
 14 (SS ¶ 52.) Furthermore, Plaintiff could have simply foregone the nonessential recreational
 15 activity altogether. (SS ¶ 53.) On this ground alone, TWC's contract provision is not oppressive.

16 Second, there was no element of "surprise" because the requirement that Plaintiff report
 17 billing errors within thirty days was not hidden. Not only is the provision in the contract itself—
 18 which Plaintiff admitted that he reviewed prior to purchasing Additional Services from TWC—
 19 but it is also conspicuously included in every billing statement directly below an all caps and
 20 underlined title "ABOUT YOUR TIME WARNER CABLE AGREEMENT." (SS ¶ 48.) The
 21 font is the same size as the rest of the text in the same area on the billing statement. (SS ¶ 49.)
 22 The language from the contract and billing statements is clear and unambiguous. This provision
 23 is not hidden, but is conspicuously displayed on a regular basis to customers, including Plaintiff.

24 Third, the provision at issue is not substantively unconscionable. Plaintiff testified in his
 25 deposition that requiring customers to report billing errors within thirty days is reasonable. (SS
 26 ¶ 51.) Accordingly, Plaintiff cannot prove that such a term creates "overly harsh" or "one-sided"
 27 results that "shock the conscience." Plaintiff cannot even prove that the contract provision is
 28 unreasonable, a much lower standard. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th

1 1305, 1322-23 (2005) (finding that unreasonableness of terms does not equate to
 2 unconscionability, rather terms must be such an extreme departure from common business
 3 practice as to shock the conscience).

4 Finally, the notice requirement about which Plaintiff complains is supported by the
 5 voluntary payment doctrine which, as the name implies, provides that payments made voluntarily
 6 to another with knowledge of the facts cannot be recovered. *Sierra Inv. Corp. v. County of Sac.*,
 7 252 Cal. App. 2d 339, 342 (1967); *Leahy v. Warden*, 163 Cal. 178, 181 (1912); *Perry v. Otay Irr.*
 8 *Dist.*, 127 Cal. 565, 570 (1900); *see also Riensche v. Cingular Wireless LLC*, No. C06-1325Z,
 9 2007 WL 3407137 (W.D. Wash. Nov. 9, 2007) (Notice of Lodgment of Exhibits and Non-
 10 California Authorities in Support of Defendant Time Warner Cable's Motion for Summary
 11 Judgment, Ex. F.). The "voluntary payment" doctrine reflects the policy that requiring timely
 12 notification of billing errors is reasonable and lawful, and cannot be found to be unconscionable.

13 **5. Plaintiff Cannot Prove Unlawful Conduct Due to a Purported Breach**
 14 **of Contract Between TWC and the HOA.**

15 The "unlawful" prong of Section 17200 proscribes engaging in business practices that are
 16 forbidden by law. *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 717-18 (2001).
 17 However, mere civil claims, such as a breach of contract claim, do not give rise to a cause of
 18 action under the "unlawful" prong of Section 17200. *See Klein v. Earth Elements, Inc.*, 59 Cal.
 19 App. 4th 965, 969 (1997). In *Klein*, the California Court of Appeal rejected a plaintiff's assertion
 20 that the "liability imposed under the doctrines of 'strict products liability and...breach of the
 21 implied warranty of fitness' will support an independent action under the 'unlawful' prong of
 22 section 17200." *Id.* The court explained that, "[w]hile these doctrines do provide for civil
 23 liability upon proof of their elements they do not, by themselves, describe acts or practices that
 24 are illegal or otherwise forbidden by law." *Id.*; *see also Bernando v. Planned Parenthood*
 25 *Federation of America*, 115 Cal. App. 4th 322 (2004) (plaintiff's allegations that websites
 26 contained misleading statements failed to provide basis for unlawfulness under Section 17200).

27 Plaintiff argues that he is a third party beneficiary of a contract between TWC and
 28 Plaintiff's HOA, and that TWC breached that agreement by charging him directly for services

1 already provided and paid for under the HOA agreement. (First Amended Complaint ¶¶ 29(g),
 2 43.) Even if they were true, these allegations cannot form the basis of a claim under the
 3 “unlawful” prong of the UCL because, as discussed above, a UCL “unlawful” claim cannot be
 4 based on a breach of contract. But as we demonstrate herein, the suggestion that TWC breached
 5 its contract with either plaintiff or the HOA is patently false. In that regard, (1) the HOA
 6 Agreement provides that TWC would provide basic cable to HOA residents (SS ¶ 55.), (2) TWC
 7 provided basic cable services to HOA residents (SS ¶ 56.), (3) TWC charged the HOA for such
 8 services, and the HOA paid TWC for the services (SS ¶¶ 57, 58.), (4) TWC never charged
 9 Plaintiff or other HOA residents for their basic cable services (SS ¶ 59.) and, (5) TWC was not
 10 contractually bound to offer Additional Services to Plaintiff at any particular prices (SS ¶ 60.).

11 **B. Plaintiff Cannot Prove that TWC Engaged in Unfair Business Practices.**

12 **1. Standard for Unfair Business Practices Under the UCL.**

13 An action may be deemed a violation of Section 17200 if it is “unfair,” even if it is not
 14 specifically proscribed by some other law. *Cel-Tech Communications v. Los Angeles Cellular*
 15 *Tel. Co.*, 20 Cal. 4th 163, 180 (1999). In *Cel-Tech*, the California Supreme Court explained that
 16 under the “unfair” prong of Section 17200, “[c]ourts may not simply impose their own notions of
 17 the day as to what is fair or unfair.” *Id.* at 182. “We must require that any finding of unfairness
 18 to competitors under section 17200 be tethered to some legislatively declared policy or proof of
 19 some actual or threatened impact on competition.” *Id.* at 186-87. Although the Supreme Court in
 20 *Cel-Tech* limited that holding to cases involving injury to “competitors” as opposed to
 21 “consumers,” *id.* at 187 n. 12, subsequent decisions have extended the analysis of *Cel-Tech* to
 22 consumer cases. *Bernardo v. Planned Parenthood Fed’n of Am.*, 115 Cal App. 4th 322, 353
 23 (2004) (“*Cel-Tech* ... may signal a narrower interpretation of the prohibition of unfair acts or
 24 practices in *all* unfair competition claims.”); *Scripps Clinic v. Superior Court*, 108 Cal. App. 4th
 25 917, 940 (2003); *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166 (2000).

26 Furthermore, the test of whether TWC’s business practices are “unfair” “involves an
 27 examination of [that practice’s] impact on its alleged victim, balanced against the reasons,
 28 justifications and motives of the alleged wrongdoer.” *Podolsky v. First Healthcare Corp.*, 50 Cal.

1 App. 4th 632, 647 (1996) (quoting *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.
2 App. 4th 1093, 1103-04 (1996).

3 Because a corporation has a contractual right to manage its business as it sees fit, there
4 exists a “business justification” defense to a claim brought under 17200. *See Lee v.*
5 *Interinsurance Exchange*, 50 Cal. App. 4th 694 (1996); *see also Motors, Inc. v. Times Mirror,*
6 *Co.*, 102 Cal. App. 3d 735, 740 (1980) (defendant’s reasons, justifications, and motives” should
7 be taken into account when weighing the “utility of the defendant’s conduct”). In *Lee*, the
8 plaintiffs were subscribers of an insurance carrier attempting to force the company to pay out a
9 surplus of the fund, but the court held that the action was barred by the “business judgment rule.”
10 The court stated, “[A]ctions which are reasonable exercises of business judgment, are not
11 forbidden by law, and fall within the discretion of the directors of a business under the business
12 judgment rule cannot constitute unlawful business practices.” *Lee*, 50 Cal. App. 4th at 713-14.

13 Plaintiff claims that TWC engaged in unfair business conduct in violation of the UCL by
14 (1) overcharging HOA customers for cable services and not providing pricing that reflected
15 services already provided for under TWC’s contract with the HOA; (2) requiring Plaintiff to
16 notify it of billing errors within thirty days of receiving erroneous charges while failing to
17 disclose that “HOA pricing” is available to HOA subscribers that properly accounts for the basic
18 cable paid for by the HOA; and (3) by breaching its agreement with the HOA by charging
19 Plaintiff for services already provided for under TWC’s agreement with the HOA. (First
20 Amended Complaint ¶¶ 38, 39, 43.) Each of these three claims is contradicted by undisputed
21 facts and cannot be proven by Plaintiff, as discussed below.

22 2. TWC Did Not Overcharge Plaintiff.

23 Plaintiff’s overcharging theory is completely erroneous and cannot be proven on several
24 grounds. First, TWC did not overcharge Plaintiff for cable services. As Plaintiff acknowledged
25 in his deposition, TWC correctly billed Plaintiff for the Additional Services he ordered from
26 TWC both before and after he changed such services to a bundled package. (SS ¶ 62.) Secondly,
27 the HOA Agreement provides only that basic cable services will be provided to HOA residents
28 and does not contain, suggest, or require pricing for any Additional Services that may be ordered

1 by residents. (SS ¶ 63.) TWC’s pricing to Plaintiff, both before and after he switched his
 2 programming to a bundled package, properly accounted for the services already provided under
 3 the Agreement between TWC and the HOA because it did not charge Plaintiff for basic cable—
 4 the services provided per the HOA Agreement. (SS ¶ 64.) Plaintiff was not unfairly
 5 “overcharged” for the Additional Services that he ordered a la carte simply because he later
 6 requested and was given a better price on a bundled package of services.

7 **3. TWC Did Not Unfairly Require Notification of Billing Errors While**
 8 **Failing to Disclose Pricing That Accounted for HOA Payments.**

9 Plaintiff’s theory that TWC acted unfairly in requiring notification of billing errors within
 10 thirty days while failing to disclose pricing that accounted for HOA payments is similarly
 11 incorrect and without merit for several, independent reasons. First, as explained above, Plaintiff
 12 lacks standing to assert claims based on TWC’s thirty-day notification requirement for billing
 13 errors because there were no errors on Plaintiff’s bills, nor was he in any way affected by the
 14 notification provision. (*See supra*, Part V.A.4.a.)

15 Second, the practice of requiring timely notification of billing errors is not inherently
 16 unfair or harmful to competition or consumers. At deposition, Plaintiff acknowledged that
 17 requiring customers to notify TWC of billing errors within thirty days is reasonable. (SS ¶ 69.)
 18 Third, the justification for such a provision greatly outweighs the impact of the provision on
 19 Plaintiff. As explained in the notification provision, TWC requires customers to notify it of
 20 billing errors within thirty days so that service levels and payments can be verified. (SS ¶ 71.)
 21 While this provision allows TWC to effectively and efficiently resolve any billing issues, the
 22 provision has had no harmful effect—or any effect at all—on Plaintiff. As Plaintiff admitted in
 23 his deposition, TWC correctly charged Plaintiff for the Additional Services he ordered both
 24 before and after he changed his services to a bundled package. (SS ¶ 72.) Accordingly, there
 25 were no billing errors for Plaintiff to report.

26 Fourth, the factual premise of the claim is entirely wrong—TWC did not unfairly fail to
 27 disclose pricing to Plaintiff that properly considered basic cable payments made by the HOA. As
 28 explained above, TWC’s pricing for Additional Services included only the proper charges for

1 such services and did not include any charges for basic cable. (*See supra*, Part V.B.2.)
 2 Accordingly, TWC could not have possibly failed to disclose such “improper” pricing because
 3 there was no improper pricing. Although Plaintiff has not claimed otherwise, it is worth noting
 4 that TWC was under no obligation to provide special pricing for Additional Services, nor was it
 5 obligated to notify Plaintiff of all potential packages and prices for its Additional Services, which
 6 were not even in existence at the time Plaintiff originally ordered Additional Services (SS ¶¶ 18,
 7 23, 77, 78.)

8 There is certainly nothing unfair about TWC’s offering bundled services packages at a
 9 discounted rate. Furthermore, and although Plaintiff’s complaint does not assert otherwise, there
 10 is nothing “unfair” about offering such discount packages to those customers who specifically
 11 order the bundle without attempting to determine if certain other customers might want to
 12 consider switching to the bundled pricing because the services they are currently ordering are
 13 similar to those contained in the bundle. TWC made a decision to offer bundled pricing packages
 14 to bulk residents, including members of homeowners’ associations. It is not uncommon for
 15 businesses to package discrete goods or services together, nor is the practice necessarily
 16 undesirable from the standpoint of the consumer. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,
 17 466 U.S. 2, 11-12 (1984). In the absence of some restraint upon competition, the mere practice of
 18 packaging services together is not inherently anticompetitive or harmful to consumers. *Id.* TWC
 19 is entitled to exercise its business discretion in making choices regarding the pricing and bundling
 20 of its products, an area of economic policy in which courts have refrained from being involved.
 21 *Belton*, 151 Cal. App. 4th at 1247, citing *California Grocers Assn. v. Bank of America*, 22 Cal.
 22 App. 4th 205, 218 (1994).

23 4. TWC Did Not Breach its Agreement with the HOA.

24 Plaintiff cannot prove a UCL violation based on the theory that TWC breached its
 25 Agreement with the HOA by charging Plaintiff for basic cable services already provided for
 26 under TWC’s Agreement with the HOA. The undisputed facts show that TWC did not breach its
 27 Agreement with the HOA or charge Plaintiff for services provided under the Agreement. (*See*
 28 *supra*, Part V.A.5.)

1 **C. Plaintiff Cannot Prove That TWC Engaged in Misleading or Deceptive**
 2 **Business Practices.**

3 **1. Standard for Misleading or Deceptive Conduct Under the UCL.**

4 A business act or practice is misleading or deceptive under the UCL if a plaintiff can show
 5 that members of the public are likely to be deceived. *Comm. on Children's Television v. Gen.*
 6 *Foods Corp.*, 35 Cal. 3d 197, 211 (1983); *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153,
 7 1160 (2000). "Likely to deceive" means that it is probable that a significant portion of the general
 8 consuming public or of targeted consumers, acting reasonably under the circumstances, could be
 9 misled. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). This requires more
 10 than a "mere possibility that the [purportedly misleading matter] might conceivably be
 11 misunderstood by some few consumers." *Id.* Where the subject matter is not deceptive on its
 12 face, the plaintiff must produce more evidence than just the purported misleading statements and
 13 his testimony, or a few isolated examples of misled consumers, in order to meet the burden of
 14 showing a significant number of reasonable consumers would be misled. *Brockey v. Moore*, 107
 15 Cal. App. 4th 86, 99-100 (2003).

16 The "deceptive" prong of Section 17200 does not impose an affirmative obligation for
 17 businesses to provide the "best possible notice" to prevent any possible misleading of the public.
 18 For example, in *Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 966 (2003), the Court of
 19 Appeal held that although a sign at a hotel warning patrons about a \$21 charge for valet parking
 20 might have been better than the notice provided, "there is no requirement [under the UCL] that
 21 reasonable notice has to be the best possible notice." The court added "[m]oreover, a potential
 22 parker could ask if there is a charge or a self-parking lot and thus is not forced to use valet
 23 parking." *Id.* Likewise in *Searle v. Wyndham Int'l, Inc.*, 102 Cal. App. 4th 1327, 1334 (2002) the
 24 court held that a hotel's practice of not expressly advising patrons that service charges on room
 25 service bills were paid to their servers did not violate the UCL.

26 Similar to his claims for unfair business practices, Plaintiff claims that TWC engaged in
 27 misleading and deceptive conduct in violation of the UCL by: (1) overcharging HOA customers
 28 for cable services and not providing pricing that reflected services already provided for under

1 TWC's contract with the HOA; (2) requiring Plaintiff to notify it of billing errors within thirty
 2 days of receiving erroneous charges while failing to disclose that "HOA pricing" is available to
 3 HOA subscribers that properly accounts for the basic cable paid for by the HOA; (3) deceptively
 4 concealing HOA pricing; (4) misrepresenting TWC's affiliation with the HOA; and (5) making
 5 false or misleading statements that Plaintiff's cable bill was reduced due to the bundling of
 6 services when the real reason for the decrease in price was that Plaintiff obtained "HOA pricing
 7 to which [he] and the HOA residents were entitled all along." (First Amended Complaint
 8 ¶¶ 29(b), 29(e), 38, 39, 43.) Each of these three claims is contradicted by undisputed facts and
 9 cannot be proven by Plaintiff, as discussed below.

10 **2. TWC Did Not Overcharge Plaintiff.**

11 As explained above, TWC could not have misled Plaintiff based on Plaintiff's
 12 overcharging theory because TWC did not overcharge Plaintiff, nor did its pricing to Plaintiff fail
 13 to account for the HOA's payments to TWC for Plaintiff's basic cable. (*See supra*, Part V.B.2.)

14 **3. TWC Did Not Mislead Plaintiff Regarding Notification of Billing Errors 15 While Failing to Disclose Pricing That Accounted for HOA Payments.**

16 As explained above, TWC did not mislead Plaintiff regarding when he was required to
 17 notify TWC of billing errors, nor did TWC fail to disclose pricing that reflected the HOA's
 18 payments to TWC for Plaintiff's basic cable. (*See supra*, Part V.B.3.)

19 **4. TWC Did Not Deceptively Conceal HOA Pricing.**

20 There are no facts to support Plaintiff's theory that TWC deceptively concealed "HOA
 21 Pricing" from Plaintiff. The undisputed facts show that the only pricing agreed to between TWC
 22 and the HOA related to the pricing for basic cable. (SS ¶ 97.) Furthermore, Plaintiff was aware
 23 that the HOA paid TWC for his basic cable. (SS ¶ 99.) TWC and the HOA had no agreement
 24 regarding Additional Services. (SS ¶¶ 97, 100, 102.)

25 The "HOA Pricing" referred to by Plaintiff is merely the pricing of one bundle of
 26 Additional Services that was made available to HOA residents who were prepared to purchase all
 27 of the services in the bundle. (SS ¶ 100.) TWC had no duty to inform Plaintiff of this or any
 28 other rates, packages, or promotions for Additional Services that were available to Plaintiff. (SS

¶ 103.) Nor was TWC obligated to offer any particular bundle packages or pricing to Plaintiff for his Additional Services. (SS ¶ 102.) Under Plaintiff's theory, businesses would have an affirmative duty to inform all their customers regarding every available option for purchase, and would then be retroactively liable if the customers later chose a different product at a lesser price. Such a theory is simply ridiculous. Plaintiff was not misled by purportedly concealed pricing because he understood businesses bundle products at a discounted rate, and he could have asked TWC at any point if any options were available for a bundle of Additional Services. (SS ¶ 101.)

5. TWC Did Not Misrepresent its Affiliation with the HOA.

As explained above, TWC did not misrepresent or mislead Plaintiff regarding its affiliation, connection, or association with the HOA. (*See supra*, Part V.A.2.)

6. TWC Did Not Mislead Plaintiff Regarding the Price Discount for Purchasing a Bundled Package of Additional Services.

As explained above, TWC did not misrepresent or mislead Plaintiff regarding his decreased bill for Additional Services upon ordering a bundled package of services vis-à-vis a variety of a la carte services. (*See supra*, Part V.A.3.)

7. Plaintiff Cannot Prove that the Public Would Be Misled or Deceived.

As noted above, it is clear that Plaintiff himself was not deceived or misled by any conduct from or associated with TWC. Furthermore, Plaintiff cannot prove that the general public would likely be misled or deceived, as is required to support his claims under the UCL's "misleading" prong. *Lavie*, 105 Cal. App. 4th at 508. To succeed on his claims, Plaintiff must produce more evidence than just the purported misleading statements and his testimony, or a few isolated examples of misled consumers. *Brockey*, 107 Cal. App. 4th at 99-100. Rather, he must present evidence showing a significant number of reasonable consumers were or would be misled. *Id.* Plaintiff cannot present such evidence. (SS ¶ 116.) For this reason, Plaintiff cannot prove any of his claims that TWC engaged in misleading or deceptive conduct under the UCL.

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1 **VI. PLAINTIFF LACKS STANDING TO BRING A CLAIM UNDER CALIFORNIA**
 2 **BUSINESS AND PROFESSIONS CODE SECTION 17200.**

3 In addition to the above, Plaintiff's action fails as a matter of law for lack of standing to
 4 bring a UCL claim. Following passage of Proposition 64, the UCL limits standing to individuals
 5 who have been injured and lost money or property as a result of the alleged unfair competition.
 6 Cal. Bus. & Prof. Code § 17204. The undisputed facts show that Plaintiff has received exactly
 7 what he paid for by purchasing his cable related services and has not been injured.

8 The UCL "operates only to return to a person those measurable amounts which are
 9 wrongfully taken by means of an unfair business practice...[I]n the absence of a measurable loss
 10 the section does not allow the imposition of a monetary sanction merely to achieve [a] deterrent
 11 effect." *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 339 (1998). In *Day*, purchasers of calling
 12 cards brought a UCL action against the telephone company because the cards claimed to have ten
 13 minutes of calling time when in fact calls were rounded up to the nearest minute. *Id.* at 329. The
 14 *Day* court dismissed the section 17200 claim because purchasers were on notice of the rounding
 15 practice, and even if misled into purchasing the cards by the representations, they "received
 16 exactly what they paid for" when using the cards after purchased. *Id.* at 339.

17 Restitution under the UCL requires both that the offending party received something it
 18 would not have received but for the unfair business practice, and that the victim gave up
 19 something they were entitled to keep. *Id.* at 340. For this reason, consumers who receive the
 20 "benefit of their bargain" cannot sustain a UCL claim. The undisputed facts show that Plaintiff
 21 received exactly what he paid for when purchasing Additional Services from TWC. Plaintiff
 22 admitted that he purchased and paid for Additional Services, that TWC's billings for the
 23 Additional Services he ordered were correct, and that he received the Additional Services that he
 24 ordered. (SS ¶¶ 118-120.) Therefore, Plaintiff received exactly what he paid for and has no
 25 measurable loss to support a UCL claim. Any attempt to calculate a monetary amount to be paid
 26 by Plaintiff would result in a refund or rebate of properly collected fees for services.

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1 **VII. CONCLUSION.**

2 For all the foregoing reasons, Plaintiff cannot prove any triable issues of material fact to
3 support his claim that TWC engaged in any unfair, unlawful, or fraudulent conduct. Accordingly,
4 TWC requests the Court grant its motion for summary judgment or, in the alternative, partial
5 summary judgment.

6 Dated: April 2, 2008

DLA PIPER US LLP

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